United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1059

To be argued by
FREDERIC S. NATHAN

ORIGINAL

United States Court of Appeals

For the Second Circuit

SUSAN L. ROSENSTIEL,

Plaintiff-Appellant,

against

LEWIS S. ROSENSTIEL,

Defendant-Appellee.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

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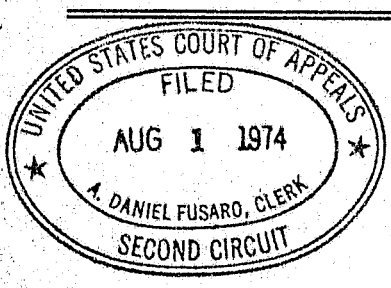
APPELLEE'S BRIEF



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United States Court of Appeals

For the Second Circuit

Docket No. 74-1059

SUSAN L. ROSENSTIEL,
Plaintiff-Appellant,

against

LEWIS S. ROSENSTIEL,
Defendant-Appellee.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

APPELLEE'S BRIEF

Questions Presented

1. Was the trial court "clearly erroneous" in its determination that plaintiff-appellant had not established that the defendant-appellant was not a *bona fide* domiciliary of Florida commencing on September 24, 1966, six months prior to the date defendant-appellee instituted divorce proceedings in Florida?

2. Was the trial court "clearly erroneous" in its determination that plaintiff-appellant had not established that her rights under an antenuptial agreement survived a Flor-

ida divorce decree where the antenuptial agreement provided for the defeasance of such rights in the event the parties were "divorced . . . by a decree of a court of competent jurisdiction"?

3. Should a constructive trust be imposed on certain of defendant-appellee's assets to secure performance of plaintiff-appellant's conditional obligations under the antenuptial agreement where the court below concluded that she was divested of any rights under that agreement and where, in any event, no basis was shown for the establishment of a constructive trust?

4. Was the denial of counsel fees to plaintiff-appellant an abuse of discretion by the trial court?

Nature of Case

This is an appeal from a judgment entered after trial without a jury (Hon. Robert J. Ward, District Judge) which dismissed on the merits an action instituted by Susan L. Rosenstiel against Lewis S. Rosenstiel. The opinion rendered by Judge Ward on December 17, 1973 is reported at 368 F. Supp. 51 (S.D.N.Y. 1973).

The principal relief sought by appellant was a declaration of the continuing validity of an antenuptial agreement. This agreement provided for the divesting of rights of appellant in the event the parties were "divorced or separated by a decree of a court of competent jurisdiction . . . ." The appellee subsequently obtained a divorce in a Florida proceeding in which appellant was duly served but elected not to appear. In order to establish the continuing

validity of the agreement, appellant advanced two claims which she presses on this appeal:

1. Appellee was not a *bona fide* domiciliary of Florida commencing six months before he instituted divorce proceedings there on March 24, 1967 and therefore the Florida court lacked jurisdiction to grant the divorce;

2. The phrase "divorce . . . by decree of a court of competent jurisdiction" is ambiguous and should not be construed as applicable to appellee's Florida divorce decree.

Appellant further argues upon this appeal, apparently on the assumption that this Court will reverse the judgment below and reinstate the antenuptial agreement, that a constructive trust should be established to protect her claims under the agreement.

Finally appellant argues that Judge Ward abused his discretion in refusing to award counsel fees to her under New York Domestic Relations Law, Section 237.

Judge Ward found that appellee had "established that he effected a *bona fide* change of domicile to Florida in January, 1965," more than two years prior to instituting the Florida proceeding (*id.* at 57).

Judge Ward found no merit in appellant's contention that the expression "divorce . . . by decree of a court of competent jurisdiction" is ambiguous (*id.* at 63).*

* With respect to appellant's other claims made in the District Court but not pressed upon appeal, Judge Ward found that (1) since appellant's fraud claim did not relate to the jurisdiction of the Florida court, the Florida judgment was controlling in a third action (*id.* at 58-60); (2) even if the District Court could sit as a Florida court under Florida law, intrinsic fraud could not be raised collaterally (*id.* at 61-62); and (3) there was no credible evidence to support appellant's $3,000,000 tort claim (*id.* at 63-64).

Judge Ward then decided in the exercise of his discretion not to award counsel fees to plaintiff, noting that appellant "has a substantial income, $96,000 per year, from the support payments [appellee] makes to her" and that the two claims with respect to which Section 237 authorized the court in its discretion to direct the husband to pay the wife's counsel fees, had "minimal merit" (*id.* at 64).

The questions presented on this appeal thus consist of four narrow issues:

1. A challenge to the factual determination of domicile (Appellant's Brief, Point I);

2. A claim that the phrase "divorce . . . by a decree of a court of competent jurisdiction" is ambiguous, and factually was not intended to apply to a valid divorce decree made by a court which was not also competent to adjudicate property rights (*id.* Point II);

3. A claim that a constructive trust of appellee's assets sufficient to satisfy appellant's claim under the antenuptial agreement should be imposed (*id.* Point III); and,

4. A claim that the court below abused its discretion in refusing to grant counsel fees for a portion of the legal services rendered below (*id.* Point IV).

Facts

1. Prior Proceedings

The parties were married on November 30, 1956. Both had been married before. They separated in October, 1961. A month later appellee commenced an action in Connecticut, the marital domicile, for an annulment or divorce. Appellant appeared specially in that action, claiming that appellee was not a domiciliary of Connecticut, and brought an action in the New York Supreme Court to enjoin the prosecution of those proceedings.

Appellant's motion in New York for a temporary injunction against the continuation of the Connecticut proceedings was denied at Special Term, 32 Misc. 2d 542 (Sup. Ct. N.Y. Co. 1962), and that determination was affirmed by the Appellate Division. 15 App. Div. 2d 880 (1st Dept. 1962).

However, appellee discontinued the Connecticut action and brought suit in New York for an annulment, asserting as the basis of jurisdiction appellant's claim of residence here. After trial, a judgment of annulment was awarded to appellee on the ground that New York could not recognize as valid appellant's prior Mexican divorce because it was based not on domicile but on the submission of the parties to a foreign court. 43 Misc. 2d 462 (Sup. Ct. N.Y. Co. 1964). This judgment was reversed on appeal and the validity of appellant's Mexican divorce decree was upheld. 21 App. Div. 2d 635 (1st Dept. 1964), aff'd, 16 N.Y. 2d 64 (1965), cert. den., 384 U.S. 971 (1966).

The judgment of annulment reserved to appellant, at her request, the right to apply for alimony and counsel fees after the appeals were decided. By decision dated November 30, 1966, Mr. Justice Helman awarded appellant alimony and counsel fees. *Rosenstiel* v. *Rosenstiel,* 156 (104) N.Y.L.J., Dec. 1, 1966, p. 17, col. 7. Upon appeal the alimony award was increased to $96,000 per year. 28 App. Div. 2d 651 (1st Dept. 1967), aff'd without opinion, 20 N.Y. 2d 925 (1967).

Thus, the hearing held before Justice Helman had to do only with appellant's right to alimony in an action for *annulment* brought by appellee against her five years earlier based upon *her* claim of residence in New York State. No adjudication of divorce or separation was made or sought.

On March 24, 1967, appellee instituted an action for divorce against appellant in Dade County, Florida, based upon his domicile there. The grounds for divorce alleged by appellee in Florida were appellant's "extreme cruelty" [Fla. Stat. Section 65.04(4), as amended, Fla. Stat. Sec. 61.041(4) (1967), repealed, 1971] and "habitual indulg-[ence] in a violent and ungovernable temper" [Fla. Stat. Section 65.04(5), as amended, Fla. Stat. Sec. 61.041(5) (1967), repealed, 1971]—two separate grounds for marital relief which were different from those set forth in New York Domestic Relations Law, Section 170 (McKinney 1964).

Appellant elected to default in the Florida divorce proceeding, although she did not deny that valid service of process had been made upon her pursuant to Florida law. 368 F. Supp. at 55. She moved in the Supreme Court of New York, however, for an order enjoining appellee from

prosecuting the Florida proceeding. Appellant's application for an immediate injunction was denied by Justice Mangan at Special Term who noted that "the defendant has amply demonstrated . . . long before commencement of the present action in Florida, that he is now domiciled in the State of Florida." *Rosenstiel* v. *Rosenstiel,* 157(79) N.Y.L.J., April 25, 1967, p. 17, col. 7. On May 4, 1967, the Appellate Division refused to enjoin the Florida action pending appellant's appeal. See Opinion of Tenney, J., *Rosenstiel* v. *Rosenstiel,* 278 F. Supp. 794, 798-799 (S.D.N.Y. 1967).

Following appellant's unsuccessful efforts in the New York State courts to enjoin appellee's Florida action, a default judgment was filed against her in the Florida action. On May 5, 1967, a hearing was scheduled for the morning of May 12, 1967 for the taking of appellee's evidence. That hearing was held as scheduled and the presiding judge signed a final judgment of divorce in appellee's favor which was then filed. *Ibid.*

2. The Present Action

This action, based on diversity of citizenship, was commenced on May 12, 1967. An *ex parte* order was signed the same day by Judge Wyatt temporarily restraining appellee or his agents from going forward with the Florida default judgment. Because the prohibitory injunction had been rendered moot by the making earlier that day of the Florida divorce judgment, appellant sought to convert the original prohibitory injunction into a mandatory injunction to require appellee to undo the Florida divorce. Judge

Tenney denied this and a related motion. *Rosenstiel* v. *Rosenstiel,* 278 F. Supp. 794 (S.D.N.Y. 1967).

After a seven day trial without a jury in May, 1973 of all the issues presented in the amended complaint, Judge Ward dismissed the action on the merits. Appellant now appeals from the judgment entered by Judge Ward.

POINT I

The trial court's determination that appellant failed to establish that appellee was not a *bona fide* domiciliary of Florida was supported by overwhelming evidence and certainly was not "clearly erroneous."

1. Introductory

Article IV, Section 1 of the United States Constitution provides:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

This has been held to mean that a jurisdictionally valid judgment of one state may not be challenged upon the merits by a sister state. Further, the later of two jurisdictionally valid judgments must be given effect in a third action.* As stated in *Chenu* v. *Board of Trustees,* 12 App. Div. 2d 422 (1st Dept. 1961), unanimously aff'd without opinion, 11 N.Y. 2d 688, cert. denied, 370 U.S. 910 (1962), the second of two inconsistent judgments "controls and determines the rights of the parties" and is entitled to

* Appellant has abandoned on this appeal her claim that the Florida decree is inconsistent with her New York alimony judgment.

full faith and credit in a third action. Thus, the judgment of divorce granted to defendant in Florida on May 12, 1967 is not vulnerable to collateral attack in the present action except on the ground that the Florida court lacked jurisdiction to grant a divorce. *Chenu, supra.* Appellant never disputed that she was properly served in the Florida divorce action by publication. On this appeal the attack on the validity of the Florida decree is limited to the claim that appellant was not a resident of Florida commencing on September 24, 1966, six months before he commenced the Florida divorce proceedings.

The applicable Florida statute in effect at the time of commencement and determination of appellee's Florida divorce action was Fla. Stat. 1965, Sec. 65.02 (now Fla. Stat. 61.021, which is identical to its predecessor in all relevant respects), which provided in relevant part as follows:

> "65.02 *Residence Required.*—To obtain a divorce plaintiff must reside six months in the state before filing the complaint . . . ."

"Residence" as used in this statute has been construed as being synonymous with "domicile". See, for example, *Wade* v. *Wade,* 93 Fla. 1004, 113 So. 374 (Sup. Ct. 1927); *Perez* v. *Perez,* 164 So. 2d 561 (Fla. D.C. of App. 1964). Domicile in turn is defined as comprising two elements: (1) the fact of actual living in the state, and (2) the intention of making the state one's permanent home, *Warren* v. *Warren,* 73 Fla. 764, 75 So. 35 (Sup. Ct. 1917), or one's home "for an indefinite period," *Perez* v. *Perez, supra.* See also *Carter* v. *Carter,* 19 App. Div. 2d 513 (1st Dept. 1963).

2. Factors requiring affirmance of the finding of Florida domicile

The appellant disregards (1) the heavy burden imposed by the authorities, including *Williams* v. *North Carolina II,* 325 U.S. 226 (1945), on one attempting to attack a divorce decree by disproving domicile, (2) the "clearly erroneous" test of Rule 52(a), F.R.C.P.; and (3) Judge Ward's careful consideration of the factual data and the credibility of witnesses.*

a. Burden of Proof

In an action collaterally attacking a divorce decree in a sister state, there is a presumption that the divorce plaintiff had a domicile in the divorce state. The burden of disproving domicile "rests heavily upon the assailant." *Williams* v. *North Carolina II,* 325 U.S. 226, 233 *et seq.* (1945). It should be noted that appellee, unlike his counterpart in *Williams,* did not set up a temporary domicile for the minimum statutory period. The evidence showed that appellee was still a resident of Florida at the time of trial in May, 1973, more than eight years after the time when Judge Ward found that his Florida domicile had commenced.

The party attacking the decree must establish the lack of domicile "by clear and convincing evidence or by the clearest and most satisfactory evidence." 24 Am. Jur. 2d, *Divorce and Separation,* Sec. 962 (1966) (Citing cases). See also 36 A.L.R. 2d 760 (1954). As Judge Weinfeld held,

* Appellant, who was her own principal witness, had a previous conviction for attempted perjury (198a, 199a-201a). (References followed by a lower case "a" are to the Appendix.)

it is not proper to go behind a finding by a sister state as to *bona fide* residence where the assailant merely "resorts to conjecture and such inferences as she would have drawn from the evidence, had she been the trier of facts." *Kovats* v. *Hobby,* 132 F. Supp. 771, 773 (S.D.N.Y. 1955).

b. *Rule 52(a), F.R.C.P.*

Under Rule 52(a), F.R.C.P. "Findings of fact shall not be set aside unless *clearly erroneous* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" (Emphasis supplied).

The creation and changing of one's domicile is a question of fact. *Williams* v. *North Carolina II, supra.* The "clearly erroneous" rule applies to factual findings of domicile whether made for diversity purposes (*Ellis* v. *Southeast Const. Co.,* 260 F. 2d 280 (8th Cir. 1958); *Gallagher* v. *Philadelphia Transp. Co.,* 185 F. 2d 543 (3rd Cir. 1950); *Townsend* v. *Bucyrus-Erie Co.,* 144 F. 2d 106 (10th Cir. 1944)), or to establish jurisdiction for divorce. *Korn* v. *Korn,* 398 F. 2d 689 (3rd Cir. 1968); *Ornberg* v. *Ornberg,* 314 F. 2d 206 (3rd Cir. 1963).

As recently stated in *Krasnov* v. *Dinan,* 465 F. 2d 1298, 1302 (3rd Cir. 1972), domicile is a question of fact and as such:

> "it is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some kind of credibility, or (2) bears no rational relationship to the supportive evidentiary data."

It is clear from Judge Ward's opinion that the court carefully considered all of the factually relevant allegations. Judge Ward's opinion cannot conceivably be classified as "clearly erroneous" on this record.

c. *Judge Ward's Careful Consideration of the Facts and the Ample Support of His Opinion in the Record*

The record establishes that appellee, who was 82 years old at the time of trial (178a), decided to retire and to move his residence permanently to Florida. The question presented to Judge Ward was whether appellee effectuated his intent by September 24, 1966, a date six months prior to date when he instituted the Florida divorce proceedings. Judge Ward concluded that appellee effectuated the change of domicile to Florida in January, 1965.

In his opinion, annotated for purposes of this appeal with footnotes to some of the record references, Judge Ward scrutinized "with utmost care [appellee's] purported change of domicile" (368 F. Supp. at 58) before upholding it (*id.*, 57-8):

> "The Court finds, on balance, that defendant has established that he effected a bona fide change of domicile to Florida in January, 1965, although he retained ownership of his New York townhouse until 1968 and still owns the Connecticut property. As early as 1964, defendant told friends that he wanted to sell his business and move to Florida where he would have time to sail and fish. He expressed dissatisfaction with zoning decisions in Connecticut, unhappiness about his relationship with his family, and a general desire to

get away from New York and Connecticut. [1] In various sworn statements made in 1965, defendant listed Florida as his residence or "place of abode" which are in their contexts synonymous with domicile. [2]

In January, 1965, defendant purchased a new yacht which he berthed in Florida. [3] Contemporaneously, he began negotiations for the sale of his stock in Schenley Industries, Inc. ("Schenley"). [4] This

[1] A. Appellee told Louis B. Nichols, an ex-executive vice-president of Schenley Industries, Inc., in the Spring or early Summer of 1964 during conversations about changing appellee's domicile to Florida that he was disaffected with both New York and Connecticut, that he was tired and wanted to sell his business, that he wanted to get away from business and litigation pressures in New York and Connecticut and that he wanted to spend more time on his boat and be free to fish. 179a-182a; Tr. 1197-1200.

B. Appellee told Thomas Wise a neighbor in the Fall of 1964 that "he intended to make his home down there in Florida"; that he enjoyed the life down there, that he wanted to spend less time at his work and that he wanted to spend more time sailing. 159a-160a.

C. Appellee first spoke to Seymour Roberts, his personal comptroller, in November or December, 1964 about changing his domicile. 122a (lines 13-15); 124 (lines 14-17); 157a.

[2] A. Statements of address in Bill of Sale for appellee's yacht Gallant Lady VI, dated January 20, 1965 (Joint Ex. II-12).

B. Sworn Statement of "place of abode" and home port in Consolidated Certificate of Enrollment and Yacht License for Gallant Lady VI dated February 5, 1965. Joint Ex. II-13. (Title 46 U.S.C. Section 259 requires the owner to swear, among other things to his "place of abode" and "the name of the port to which [the vessel] may belong" under the penalty for falsification set forth in 46 U.S.C. Section 323).

C. Statement of residence in FCC Ship Station License, dated February 26, 1965 for Gallant Lady VI. Joint Ex. II-14.

D. Statement of residence in appellee's March 11, 1965 affidavit in connection with bond in car seizure case. 134a; Joint Ex. II-8.

E. Declarations of residence in two deeds to the above North Castle property—both dated August 12, 1965. Joint Ex. II-11-(a).

[3] 132a; Joint Ex. II-12 and 13.

[4] 185a-189a.

sale was finally consummated in 1968. [5] At about the same time, defendant also transferred his bank accounts, with the exception of two small farm accounts, from Connecticut to Florida while retaining other accounts in California, Texas, and New York. [6] He closed his safe deposit box in Connecticut, [7] opened one in Florida, [8] and removed to Florida all his securities [9] except those which were being bought or sold or received as stock dividends. [10] In April, 1965, defendant commenced negotiations for the sale of his New York City house [11] which sale was consummated on January 26, 1968. [12] In December, 1965, defendant began construction of a swimming pool on his Florida property. [13]

Since 1966, defendant has listed Florida as his domicile on official documents, [14] except for vehicles

[5] 141a-144a; 190a; Joint Ex. IV-4.

[6] 124a-125a; 128a; Joint Ex. II-8.

[7] 124a.

[8] 130a; Joint Ex. II-9.

[9] 125a-126a; 131a; Joint Ex. II-11.

[10] 126a.

[11] 137a; Joint Ex. II-23.

[12] 135a-138a; Joint Ex. II-23.

[13] 139a-142a; Joint Ex. II-24.

[14] A. Statement of residence on August 25, 1966, F.C.C. radio/telephone license for Gallant Lady VI. Joint Ex. II-15.

B. Sworn Statement of owner's place of abode and Gallant Lady VI's home port at Miami in Certificate of Enrollment and Yacht License dated March 20, 1967 and the attached renewals thereof in Florida to date. Joint Ex. II-16.

C. Appellee's 1968 passport (first passport issued after defendant became Florida domiciliary in January, 1965) showing Florida residence. 194a; Def. Ex. Q.

D. Filing of appellee's Application for Homestead Exemption sworn to February 10, 1967 and Declaration of Domicile (Ch. 222

which he previously owned and for which he did not transfer the registration to Florida until a year or two after 1965. [15] Schenley, however, in its reports to the Alcohol and Tobacco Tax Division of the Treasury Department did not report a Florida address for defendant until December 20, 1967. On several of these reports filed by Schenley prior to December 20, 1967, both Connecticut and New York home addresses were listed for Mr. Rosenstiel which tends to indicate that the person preparing the report either was not concerned with domicile in the legal sense or had no idea of which of defendant's numerous residences was his legal domicile. These reports, therefore, have little or no probative value in refuting that defendant was a Florida domiciliary at the time he obtained his Florida divorce and that he has remained a domiciliary of that state up until the present time.

From 1965 through 1968, defendant spent most of his time in Florida. He spent approximately three months during the summer in Connecticut, [16] returning to Florida at the end of the hurricane season in late September or October and remaining there until about June of the following year. [17] He occasionally spent a winter week-end in Connecticut if he had been in New York, where Schenley's main office was located. [18] Defendant apparently spent as

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Fla. Stats. Section 222.17) sworn to February 23, 1967—both attesting to Florida residence since January 11, 1965 (Joint Exs. II-25 and II-26). (The Homestead Exemption entitled a Florida resident to an exemption from all taxation of up to $5,000; of assessed valuation. Ch. 192 Fla. Stats., Sections 192.12, 192.14.)

E. Registration to vote in Miami, Florida on June 19, 1967 based upon residence in Florida for at least one year (Joint Ex. II-20 and Ch. 97 Fla. Stats., Section 97.041).

[15] 133a; Joint Ex. II-17.

[16] 169a.

[17] 177a.

[18] 145a-147a.

little time as possible in New York consistent with his continuing duties as chairman of the board of Schenley.

After the sale of his interest in Schenley and of his New York City townhouse in 1968 and until the present, defendant has spent an even greater part of his time in Florida and very little time in New York. [19] Although he has continued to spend summers in Connecticut, he has not been there during the winter months since 1968. [20]

This evidence presents a picture of a man who, in fact, established actual residence in Florida as early as 1965 with the intent that it be permanent. He did everything possible to effect this change consistent with his continuing duties until 1968 as the chairman of the board of a major corporation. While it is true that much of what defendant did to effectuate the change consisted of formal acts, that is almost always the case when a person is effectuating a change of domicile. It has never been held nor has plaintiff suggested that in order to effect a change of domicile, a person can never again set foot in his former domicile. Defendant's retention of homes in other states including his former domicile has led the Court to scrutinize with utmost care his purported change of domicile, but it does not preclude a finding that such a change was, in fact, effectuated." [Footnote references and footnotes added]

3. Appellant's argument on domicile

Appellant's challenge to the trial court's determination of domicile is threefold. First, appellant points to a number of factual allegations advanced and considered below to demonstrate that appellee's Florida domicile was not timely established; second, appellant discusses appellee's

[19] 151a.

[20] 169a.

history and conduct in connection with his marital litigation to demonstrate his "subjective intent" with respect to domicile; and third, appellant seeks to raise a presumption from appellee's election not to testify at trial.

a. *Alleged Inconsistent Facts*

Appellant notes a few facts which are claimed to point to a contrary conclusion without alluding to the factors supportive of the trial court's conclusion. The annotations to the quoted portions of Judge Ward's opinion show there is more than ample support for each of his findings and conclusions.

Moreover, the few evidentiary matters referred to in appellant's brief are either not supportive of the conclusion that appellee was not a domiciliary of Florida commencing on September 24, 1966, or are contrary to other evidence which Judge Ward found more persuasive. For example, appellant refers to Walter Jahn's testimony at the May 12, 1967 Florida divorce hearing (Ex. 14, 217a) that "as late as two or three months ago [appellee] told me he was going to live in Florida from now on." Appellant then states that "this witness did not testify that Lewis had been domiciled in Florida for at least six months prior to the institution of the Florida divorce action." Appellant's brief, p. 15.

Appellant is simply incorrect. On the same page of the same transcript the same witness testified:

> "Q. Do you know where the plaintiff, Mr. Rosenstiel is presently residing?

A. Yes, I do, 1350 W. 29th St. [Dade County, Florida].

Q. Do you know how long he had been a resident of Dade County?

A. I have known he has lived on and off here for about 10 years but I understand he has permanently moved here in the last one or two years." (*Id.* at 217a).

Further, that transcript contains ample other evidence that appellee was a permanent resident of Florida early in 1965 (Ex. 14, 202a-226a).

Similarly, with respect to the Schenley records cited by appellant, Judge Ward noted that the evidence seemed to indicate "that the person preparing the reports either was not concerned with domicile in the legal sense or had no idea of which one of defendant's numerous residences was his legal residence." 368 F. Supp. at 58. With respect to the two witnesses' testimony referred to by appellant (Wise and Nichols), both testified extensively to factors indicative of the conclusion that appellee in fact became a resident of Florida early in 1965 (*e.g.* 159a-160a, 179a-182a). Finally, the date of the sale of Schenley stock and the dates when appellee got around to changing from a resident to a non-resident member of the Lotos Club and Century Country Club, are not significant factors in determining when appellee effectuated a change of domicile. Indeed he was not eligible to make this change with respect, at least, as to the Century Country Club while he had an office at Schenley's headquarters in New York City (99a, 102a).

The isolated factors highlighted by appellant do not detract from Judge Ward's documented conclusions, much less make them "clearly erroneous".

Even if this were a *de novo* determination, and even if appellee had the burden of proof, the facts adduced at trial overwhelmingly support the conclusion that appellee was a domiciliary of Florida well prior to September 24, 1966. It is frivolous to imply that the trial court's finding of domicile was "clearly erroneous."

b. *Appellee's Alleged "Subjective Intent"*

Appellant's review of the history of the marital litigation is an attempt to demonstrate appellee's subjective intent is equally frivolous, particularly, in view of appellant's recognition of the fact that "motive for effecting a true *bona fide* change in domicile cannot affect the issue of jurisdiction of the court of domicile in respect to the marital res". Appellant's brief, p. 12.

In *Milbank* v. *Milbank*, 36 App. Div. 2d 292 (1st Dept.), aff'd, 29 N.Y. 2d 844 (1971) which involved a collateral attack on a Nevada divorce the court stated (at p. 294):

> "While it is easily apparent that [the husband's] move to Nevada was for the purpose of divorce and remarriage, as long as he complied with all the indicia, and he did, for establishment of domicile, we should not go behind the determination of the Nevada court."

See, also, *Matter of Newcomb*, 192 N.Y. 238 (1908).

It should be noted that, unlike the husband in *Milbank*, *supra*, appellee's change of domicile was not a transitory one made for meeting the jurisdictional requirement for

divorce and then abandoned. As Judge Ward noted, there can be no question that appellee intended to make Florida his permanent domicile and that his actions from January, 1965, through the time of trial of this action in 1973 all have been completely consistent with his earlier expressed intent.

c. *The Alleged Inference from Appellee's Failure to Testify*

Appellant's efforts to draw an inference from appellee's failure to testify is inappropriate. The record shows that appellee was almost eighty-two years old at the time of trial (178a, Pltf's Ex. Q), had recently suffered a stroke (191a), was confined to a wheelchair and required constant nursing attention (155a-156a).

4. Conclusion

Judge Ward's conclusion that appellee's "Florida judgment of divorce is a valid judgment of a court of competent jurisdiction" (368 F. Supp. at 62) should be affirmed.

POINT II

Appellant's rights under the antenuptial agreement did not survive the valid Florida divorce.

1. Provisions of the antenuptial agreement

The antenuptial agreement, as amended on June 15, 1959, provides that:

> "upon condition that [appellant] survive [appellee] and upon further condition that at the time of [appellee's] death the said parties have not been divorced

> or separated by a decree of a court of competent jurisdiction, or separated by written agreement,"

appellee was to bequeath to appellant a number of shares of Schenley stock equivalent to 25,000 shares issued and outstanding on November 29, 1956 or if appellant did not hold such shares then appellant would receive cash or other property equal to $450,000.

2. These provisions are valid and enforceable

It is well established that a provision in an antenuptial agreement or a will divesting the wife of rights in the husband's estate upon divorce or separation must be given effect even though the divorce is granted without fault by the wife. *Benjamin* v. *Benjamin,* 197 Misc. 618 (Sup. Ct. N.Y. Co.), aff'd, 277 App. Div. 752 (1st Dept. 1950), aff'd, 302 N.Y. 560 (1951); *Matter of Hart,* 31 App. Div. 2d 548 (2d Dept. 1968), leave to appeal denied, 24 N.Y. 2d 738 (1969).

3. There is no basis for appellant's claim that the phrase "divorce by a court of competent jurisdiction" is ambiguous

a. *Appellant's Claim*

In order to circumvent the clear conclusion that appellant's rights under the antenuptial agreement did not survive appellee's Florida divorce, appellant seeks to argue that the phrase "divorce . . . by a court of competent jurisdiction" is ambiguous and because of the circumstances should be resolved in her favor.

The claimed ambiguity is that the phrase "divorced . . . by a court of competent jurisdiction" could refer to a

court with competent jurisdiction (a) to affect marital status and property rights or (b) to affect marital status alone. She argues that the parties' intent was that the first definition be applicable so that only a court which had acquired *in personam* jurisdiction could divest her of her rights under the antenuptial agreement. Appellant's brief, p. 32.

b. *Appellant Fails to Support Her Own Interpretation With Any Evidence, Law or Logic*

Even assuming, *arguendo,* that the clause is ambiguous, appellant's argument cannot prevail. The record references cited by appellant to support her novel claim as to the parties' intent, as summarized on p. 29 of her brief, do not even deal with the alleged dichotomy. There is no suggestion in the record that either of the parties or their lawyers ever considered the effect of an *ex parte* foreign divorce on the defeasance clause, much less that they intended the unprecedented "interpretation" urged by appellant to apply.

Moreover, appellant's insinuation that the insertion of the defeasance clause was somehow unfair is belied by the facts that the clause (1) is a usual and common one (*Benjamin, supra*), and (2) parallels the New York statutory provisions which would be applicable in the absence of an antenuptial agreement. EPTL Section 5-1.2(a)(1) expressly denies a survivor the right to elect against a former spouse's will or to be eligible for distribution of an intestate estate if a judgment of divorce "recognized as valid under the laws of this state was in effect when the deceased spouse died." The defeasance clause in the an-

tenuptial agreement has precisely the same effect on the appellant's contract rights in appellee's estate as the EPTL has on her statutory inheritance rights. See *In re Adams' Will,* 142 N.Y.S. 2d 32 (Sur. Ct. Nassau 1955); *In re Dollinger's Will,* 143 N.Y.S. 2d 155 (Sur. Ct. Westchester 1955).

It is obvious that there is no ambiguity and that appellant is asking the court to rewrite the agreement. Appellant fails to point to any basis in law or logic for arguing that the "a court of competent jurisdiction to grant a divorce" means a court which also has jurisdiction to affect property rights.

c. *The "Divisible Divorce" Doctrine Is Inapplicable*

Finally appellant seeks to create an ambiguity out of a fallacious analysis of the doctrine of "divisible divorce", *Estin* v. *Estin,* 334 U.S. 541 (1948) and *Armstrong* v. *Armstrong,* 350 U.S. 568 (1956). There is no way that the doctrine of divisible divorce could create an ambiguity or otherwise help appellant's cause. That doctrine merely states that a valid *ex parte* divorce cannot affect the stay-at-home wife's "vested legal rights," such as the right to alimony under a prior decree. It has never been held to mean that a valid *ex parte* divorce is not effective to terminate inchoate or contingent rights which are contingent upon the parties' remaining married, such as the right to inherit under a statute or an antenuptial agreement with a defeasance clause such as the one here in question. Judge Ward properly held (368 F. Supp. 63):

> "Furthermore, this is not an appropriate case for application of the doctrine of 'divisible divorce.' *Es-*

> *tin* v. *Estin,* 334 U.S. 541 (1948). Except to dissolve the marriage, Florida did not adjudicate any rights of plaintiff in an action in which she was not personally served and did not appear. Florida has not, nor did it attempt, to determine plaintiff's property rights. A determination of the contractual property rights asserted by plaintiff in this action is governed solely by the terms of the antenuptial agreement, a matter with which the Florida court was not concerned. The Florida decree does not divest plaintiff's property rights; it only determines the Rosenstiels' marital status. *Stilwell* v. *Continental Ill. Nat. B & T of Chicago,* 31 Ill. 2d 546, 202 N.E. 2d 477 (1964); *Kovats* v. *Hobby,* 132 F. Supp. 771 (S.D.N.Y. 1955)."

In *Stilwell* v. *Continental Ill. Nat. B & T of Chicago,* 31 Ill. 2d 546, 202 N.E.2d 477 (Sup. Ct. 1964), a former wife claimed a widow's pension on the death of her husband who had obtained an *ex parte* Arkansas divorce. The wife argued that, even if valid, the divorce decree could not extinguish her property right in the pension. Holding the divorce valid because the husband was domiciled in Arkansas and that the wife's rights in the pension were theretofore defeated, the court stated:

> "The interest claimed here is one established under a private contract which provides benefits to the 'widow of the deceased pensioner.' This is not a question falling under the doctrine of divisible divorce, as the Arkansas decree is not relied upon to divest plaintiff's property rights but instead to determine the marital status of Mr. and Mrs. Stilwell at Mr. Stilwell's death. For this purpose the decree must be granted full faith and credit."

To the same effect is *Kovats* v. *Hobby, supra,* where, after a wife obtained a support order in a New York separation action, her husband moved to Arkansas and obtained an *ex parte* divorce. Judge Weinfeld upheld the referee's finding that the wife had been properly served under Arkansas law and that the wife's conjecture "did not negate the Arkansas court's finding that the husband had established a *bona fide* residence there." The court therefore held that the divorced wife was not entitled to a "wife's insurance benefits" under the Social Security Act because she was no longer the wage earner's legal wife. So holding, Judge Weinfeld said: "I see no occasion to discuss the doctrine of divisible divorce. There is no issue . . . involving her rights under the New York judgment of separation." 132 F. Supp. at 773-74.

Finally, in *Simons* v. *Miami Beach First National Bank,* 157 So. 2d 199 (Fla. D.C. of App. 1963), rehearing denied, 166 So.2d 151 (Fla. Sup. Ct. 1964), aff'd, 381 U.S. 81 (1965), a case factually similar to the instant action, it was held that an *ex parte* Florida divorce based on constructive service terminated a New York "widow's" right to dower. Previously, the wife had obtained a New York separation decree providing for alimony. Her husband then moved to Florida where he was granted a divorce. The wife was served by publication and did not appear in the Florida divorce proceeding. After the husband's death the wife brought a collateral proceeding in Florida attacking the divorce. The Florida courts held the divorce valid to terminate the marital status as well as the wife's inchoate right of dower in Florida realty which, under Florida law, required her to be the husband's wife at the time

of his death. The United States Supreme Court, noting the wife's failure to appear in the Florida court, rejected the wife's claim that the Florida court lacked power to affect her property under the prior New York decree (which she said subsumed her right to dower) as follows:

> "The short answer to the contention is that the only obligation imposed on Sol Simons by the New York decree, and the only rights granted petitioner under it, concerned monthly alimony for petitioner's support. Unlike the ex-husband in Estin, Sol Simons made the support payments called for by the separate maintenance decree notwithstanding his ex parte divorce. In making these payments until his death he complied with the full measure of the New York decree; when he died there was consequently nothing left of the New York decree for Florida to dishonor.
>
> This conclusion embodies our judgment that there is nothing in the New York decree itself that can be construed as creating or preserving any interest in the nature of or in lieu of dower in any property of the decedent, wherever located. Petitioner refers us to no New York law that treats such a decree as having that effect, or, for that matter, to any New York law that has such an effect irrespective of the existence of the decree. We think it clear that the burden of showing this rested upon petitioner. [Citations] It follows that insofar as petitioner's argument rests on rights created by the New York decree or by New York law, the denial of her dower by the Florida courts was not a violation of the Full Faith and Credit Clause." 381 U.S. at 84-85.

The Supreme Court confirmed the inapplicability of the doctrine of divisible divorce as follows:

> "Insofar as petitioner argues that since she was not subject to the jurisdiction of the Florida divorce

> court its decree could not extinguish any dower right existing under Florida law, [citing *Vanderbilt*], the answer is that under Florida law no dower right survived the decree. The Supreme Court of Florida has said that dower rights in Florida property, being inchoate, are extinguished by a divorce decree predicated upon substituted or constructive service. . . .
>
> "It follows that the Florida courts transgressed no constitutional bounds in denying petitioner dower in her ex-husband's Florida estate." 381 U.S. at 85.

Thus under both Florida and New York law appellant's contingent rights to receive property upon her husband's death are cut off by an *ex parte* divorce whether those rights are considered inchoate rights which never came into existence or whether they are considered contingent contractual rights which never vested.

4. Judge Ward properly held the subject clause to be clear and unambiguous

Judge Ward properly held that there was no merit to appellant's claim that the defeasance clause was ambiguous and that any ambiguities should be resolved in her favor because of the "circumstances" (368 F. Supp. at 63):

> "The Court finds no merit to this contention. Even if plaintiff did not herself comprehend the exact meaning of these words, she was represented by counsel of her own choosing."

Judge Ward's finding that the defeasance clause was not ambiguous is squarely supported by an unbroken line of authorities. Appellant cites no contrary authority.

The phrase "divorce . . . by a court of competent jurisdiction" is standard language in an antenuptial agree-

ment and identical or almost identical language has uniformly been held to be plain and unambiguous. See, *Benjamin* v. *Benjamin, supra,* ("not having been divorced or separated by decree of a court of competent jurisdiction or separated by written agreement"); *Matter of Hart, supra,* ("not been separated by a court of competent jurisdiction").

As noted in *Taber* v. *First Citizens B & T of Utica,* 247 App. Div. 580, 587 (4th Dept. 1936), aff'd, 273 N.Y. 539 (1937), with respect to an antenuptial agreement:

> "The trial court has also found that 'a construction of the antenuptial agreement whereby the plaintiff was to receive merely an annuity of $1,500 a year would be unfair, unreasonable and unconscionable.' But in the absence of fraud and ambiguity 'we are not at liberty to revise while professing to construe.' (Sun P. & P. Assn. v. Remington P. & P. Co., 235 N.Y. 338, 346.) 'The court cannot substitute a different contract in place of the one actually made because it may think that the plaintiff was unwise in making it.' (Carrol v. Title Guarantee & Trust Co., 131 App. Div. 221, 223.) 'If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction.' (Loud v. Pomona Land & Water Co., 153 U.S. 564, 576; Schoonmaker v. Hoyt, 148 N.Y. 425, 431.)" 247 App. Div. 587

Further, with respect to appellant's claim that under the "circumstances" any ambiguity should be resolved in her favor, it should be noted that appellant had been married previously and she was well off financially prior to her ex-

ecuting the antenuptial agreement (Tr. 48-50).* Furthermore, as we have seen, the antenuptial agreement took away nothing that she would have had in the absence of an agreement.

Moreover, despite her contrary insinuations, appellant was represented by competent counsel of her own choosing when she entered into the agreement (Tr. 81-2, 108a, 113a-116a).

The trial court properly concluded that appellant failed to establish her claim that under the circumstances the agreement must be interpreted in her favor. This conclusion may be reversed only if "clearly erroneous." Rule 52(a), F.R.C.P.

5. Conclusion

The provision of the antenuptial agreement divesting appellant of her rights upon a "divorce . . . of a court of competent jurisdiction" is clear, enforceable and became effective upon the making of the Florida divorce decree.

POINT III

There is no justification for establishing a constructive trust.

Appellant's contention that a constructive trust should be established is at most a contingent argument predicated upon the assumption that this court will reverse the trial court's judgment for the reasons advanced in Points I or II of her brief.

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* Tr. refers to pages of the transcript which are not included in the Appendix.

Judge Ward did not expressly deal with this contention, presumably because it was rendered moot by the court's decision that appellant was divested of her rights under the antenuptial agreement by reason of the Florida divorce.

In any event there is no provision in the antenuptial agreement which gives appellant any right to a constructive trust or to any other security device to insure that the decedent's estate would be able to perform its obligations. On the contrary, the letter and intent of the agreement clearly authorizes appellee to deal with his assets as his own during his lifetime.

This request for a constructive trust is predicated upon appellant's fourth claim which alleged that "defendant is attempting to secrete and/or remove said assets from the jurisdiction of this court and thus defeat plaintiff's contractual rights." (Amended Complaint, Par. 35, at 20a). However, the evidence introduced at trial as summarized in appellant's Point III does not present any assertions which arguably can be viewed as supportive of this position. Moreover, there was no proof that appellee's estate would not be able to pay appellant $450,000 in the event that appellant survived him and that the parties had not then been separated or divorced by a court of competent jurisdiction or by written agreement.

The undisputed proof at the trial was that appellee sold all of his Schenley stock for cash in 1968 (141a-144a) so that if appellant were to be entitled to anything under the antenuptial agreement upon appellee's death, she would be entitled only to the fixed sum of $450,000. The court found, and it is not disputed, that appellee has made all

required payments pursuant to the award of $96,000 a year for alimony. There is therefore no reason to assume that appellee's estate would not comply with a determination that appellant was entitled to $450,000.

There is thus no legal or factual basis for appellant's request for the imposition of a constructive trust.

POINT IV

The court properly denied counsel fees to plaintiff in the exercise of its discretion under New York Domestic Relations Law, Section 237.

Appellant appeals from the denial of her claim under New York Domestic Relations Law, Section 237, subdivisions 4 and 5, for her counsel fees in prosecuting her first cause of action and her earlier attempt herein to enjoin the Florida divorce proceeding. Section 237 provides with respect to such claims that

> "... The court *may* direct the husband ... to pay such sum or sums of money to enable the wife to carry on ... the action or proceeding *as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.*" (Emphasis supplied).

Judge Ward held (368 F. Supp. at 64):

> "Since the doctrine of necessaries has no applicability to this action, *Frooks* v. *Peck*, 35 Misc. 2d 177, 232 N.Y.S. 2d 137 (Sup. Ct., App. Term, 1st Dep't 1962), any award of counsel fees is governed by Domestic Relations Law section 237 (McKinney 1964). Under this section, only plaintiff's challenge to the validity of

> the foreign *ex parte* divorce judgment and her action to enjoin the prosecution of a divorce in a foreign jurisdiction can form the basis for an award of counsel fees. This section makes such an award discretionary. The Court, in the exercise of its discretion denies plaintiff counsel fees. Plaintiff has a substantial income, $96,000 per year, from the support payments that defendant makes to her. Moreover, these claims, although they cannot be denominated frivolous, had minimal merit. Under these circumstances, the Court considers an award of counsel fees to be unwarranted."

Judge Ward's discretionary determination not to award attorney's fees can only be set aside upon appeal if there has been a clear abuse of discretion or an obvious miscarriage of justice. See, *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 467 F. 2d 95 (5th Cir. 1972), rehearing and rehearing *en banc* denied 471 F. 2d (1973); *Roth* v. *Reich*, 164 F. 2d 305 (2nd Cir. 1947).

As noted by Judge Learned Hand, "It is the universal rule that an appellate court will not review allowances to attorneys except in cases of an obvious miscarriage of justice." *Roth* v. *Reich, supra,* at 311. Judge Ward's decision not to grant counsel fees was within his discretion and not a miscarriage of justice.

The basic purpose for awarding counsel fees in a matrimonial action is to insure that an indigent wife has legal representation. If the wife can afford to pay for her own legal fees, no award may be made. *Gruber* v. *Gruber,* 43 App. Div. 2d 917 (1st Dept. 1974); *Winter* v. *Winter,* 39 App. Div. 2d 69 (1st Dept. 1972), aff'd, 31 N.Y. 2d 983 (1973); *Kann* v. *Kann,* 38 App. Div. 2d 545 (1st Dept. 1971).

There is no question that appellant received support payments at the rate of $96,000 a year. From the commencement of the action in May, 1967 through the trial in May, 1973, she thus received, directly or indirectly, $576,000 from this source alone. Appellant, who had no children to support, lived in expensive hotels (Tr. 358, 94a-95a) and on a profligate scale. 368 F. Supp. at 63. There was no basis for finding that appellant could not afford representation.

Similarly, Judge Ward's finding that the first two causes of action had minimal merit is amply supported by the entire record.

Appellant has thus failed to meet the heavy burden of showing both that Judge Ward clearly abused his discretion under Domestic Relations Law, Section 237, and that the findings upon which his discretion was predicated were "clearly erroneous". Rule 52(a), F.R.C.P. and the cases cited *supra.*

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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Service of 8 copies of the
within Brief is hereby
admitted this 31st day of
July 1984
Signed
Attorney for